No. 3089

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED VERDE COPPER COMPANY, a West Virginia Corporation,

Plaintiff in Error,

vs.

NICK KUCHAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Superior Court of the State of Arizona, in and for the County of Yavapai.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff, Nick Kuchan, complaining of the defendant, United Verde Copper Company, a corporation, for cause of action against the said defendant alleges:

I.

That the defendant now is, and at the time of the grievances hereinafter mentioned was, a corporation doing business in the State of Arizona, to wit, in the County of Yavapai, and was then and there the owner and operated a certain mine, with tunnels, cross-cuts, drifts and stopes in said mine, and that on, to wit, the 19th day of March, 1916, the plaintiff was in the employ of said defendant in said mine upon a certain level of said mine known as the 700-foot level, and the defendant on the day aforesaid then and there also had in its employ certain other servants engaged in the placing and discharging of explosives upon said 700-foot level; and on the day aforesaid the plaintiff was then and there, in the course of his employment, going from one place of said mine on, to wit, said 700-foot level to another

place upon said 700-foot level, and the said defendant by its servants aforesaid then and there had placed upon said 700-foot level, in a hole drilled for that purpose, a large quantity of dynamite, gunpowder or other high explosive, for the purpose and with the intent of discharging the said dynamite or other explosive, and while the said plaintiff was so travelling along and upon said 700-foot level, and while in the exercise of due care for his own safety, the defendant by its said servants aforesaid, negligently and carelessly and without giving any warning of the intended discharge or explosion of said dynamite, gunpowder or explosive, did suddenly [1*]and without notice to the plaintiff discharge the same.

II.

That by said explosion as aforesaid plaintiff was then and there struck with a great quantity of rocks, stones and debris, and buried beneath the same, and thereby the plaintiff sustained severe injuries in that both eyes of the plaintiff were totally destroyed, and the hearing of the plaintiff partially destroyed, and the plaintiff thereby did sustain other and further wounds, injuries, cuts and bruises upon his entire body, especially upon his face and head, and thereby the plaintiff was permanently injured and crippled, and also sustained serious internal injuries, and plaintiff is now and will forever remain totally blind and bereft of hearing, and parts of his body, especially the left side and arm thereof, will forever remain paralyzed; and that by reason of the

*Page-number appearing at foot of page of original certified Transcript of Record.

injuries aforesaid, plaintiff will be wholly unable to ever hereafter pursue any work and labor whatsoever, and will forever remain crippled, sick, sore, lame and disordered to an extent that he will be unable to even look after his own personal wants, and will require the balance of his life constantly a nurse or attendant for his personal wants. By reason of which the plaintiff has sustained damages in the sum of Sixty Thousand Dollars ($60,000.00),

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Sixty Thousand Dollars ($60,000.00), and costs herein sustained.

And for a further and separate cause of action against the defendant the plaintiff alleges:

I.

That the defendant now is, and at the time of the grievances hereinafter mentioned was, a corporation doing business in the State of Arizona, to wit, in the County of Yavapai, and on, to wit, the 19th [2] day of March, 1916, was the owner of and then and there operated and worked certain quarries, open pits, open cuts and mines, and then and there on the day aforesaid had in its employ certain servants charged with the duty of placing and discharging dynamite, gunpowder or other high explosives within said mine; and on the day aforesaid the defendant then and there had in its employ the plaintiff working in said quarry, open pit, open cut and mine of the defendant, and more particularly in that part of said mine known as the 700-foot level. And the plaintiff on the day aforesaid while then and there engaged in his said employment suffered personal in-

juries by an accident arising out of and in the course of such labor, service and employment and due to a condition or conditions of such occupation or employment, in that while about his said labor, service and employment, and while then and there engaged in the exercise of due care for his own safety, the plaintiff was struck with great force by and was buried beneath a large quantity of rocks, stones, earth and debris as a result of an explosion of dynamite, gunpowder or other high explosive then and there caused by said other servants of said defendant working in and about said mine, and thereby sustained severe personal injuries, in that both eyes of the plaintiff were totally destroyed, his hearing partially destroyed and plaintiff also thereby sustained other wounds, cuts and bruises and serious internal and external injuries, and the flesh upon plaintiff's body and particularly on his face and head was torn, lacerated and wounded, and parts of his body especially the left side and arm thereof will forever remain paralyzed and plaintiff will by reason of said injuries be forever unable to hereafter follow his usual vocation in life or any vocation whatsoever, and will forever remain crippled, paralyzed and maimed, and will ever hereafter require a constant attendant or nurse to administer to his personal wants, and by reason of said injuries did suffer and will forever continue to suffer great physical and mental pain and anguish, and by reason [3] of said premises did sustain damages in the sum of Sixty Thousand Dollars ($60,000.00).

WHEREFORE the plaintiff prays judgment against the defendant in the sum of Sixty Thousand Dollars ($60,000.00) and costs herein sustained.

F. C. STRUCKMEYER,
Attorney for Plaintiff.

[Endorsed]: Filed at 3:00 o'clock P. M. Feb. 17, 1917. P. J. Farley, Clerk. By A. L. Jones, Deputy. [4]

In the Superior Court of Yavapai County, State of Arizona.

No. 6739.

Action Brought in the Superior Court of Yavapai County, State of Arizona.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Summons.

The State of Arizona Sends Greeting to United Verde Copper Company, a Corporation.

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of Yavapai County, State of Arizona, and answer the complaint filed with the Clerk of this Court at Prescott, in said county (a copy of which complaint accompanies this Summons), within twenty days (exclusive of the

day of service), after the service upon you of this Summons, if served in this county; in all other cases thirty days, after the service of this Summons upon you (exclusive of the day of service).

And you are hereby notified that if you fail to appear and answer the complaint as above required, plaintiff will take judgment by default against you ———, and judgment for costs and *si*bursements in this behalf expended.

Given under my Hand and Seal of said Court, at Prescott, this 17th day of February, A. D. 1917.

[Seal] P. J. FARLEY,
Clerk.
A. L. Jones,
Deputy.

By STRUCKMEYER & JENCKES,
Attorneys for Plaintiff.

[Endorsed]: Received Feby. 17th, 1917, at 5:30 o'clock P. M. Jos .F. Young, Sheriff. By J. H. Robinson, Under-Sheriff. [5]

State of Arizona,
County of Yavapai,—ss.

I hereby certify that I received the within Summons on the 17th day of February, 1917, and personally served the same on the 21st day of February, 1917, on LeRoy Anderson, Statutory Agent for United Verde Copper Company, a corporation, they being the defendants named in said Summons, by delivering to LeRoy Anderson, Statutory Agent of the said defendant, personally, in the said County of Yavapai, a copy of Summons and a true copy of the

complaint in the action named in the said Summons, attached to said Summons.

Dated this 21st day of February, 1917.

JOS. F. YOUNG,
Sheriff.
By J. H. Robinson,
Deputy.

Sheriff's Fee, Services $1.00
Mileage ..... .20

Total, $1.20

No. 6739. In the Superior Court of Yavapai County, State of Arizona. Nick Kuchan, vs. United Verde Copper Co., a Corporation. Summons. Filed Feby. 24, 1917, at 2 o'clock P. M. P. J. Farley, Clerk. By A. L. Jones, Deputy. [6]

In the Superior Court of Yavapai County, State of Arizona.

NICK KUCHAN,
Plaintiff,
vs.
UNITED VERDE COPPER COMPANY, a Corporation,
Defendant.

Order for Removal.

The defendant in the above-entitled action having within the time provided by law filed its petition in due form for the removal of said action to the District Court of the United States for the District of

Arizona, and having at the same time offered a good and sufficient bond as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States:

NOW, THEREFORE, it is hereby ordered that this action be removed into the District Court of the United States for the District of Arizona, and that all further proceedings in this Court in said action are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in the said United States District Court.

Done this 8th day of March, A. D. 1917.

FRANK O. SMITH,
Judge.

[Endorsed]: Filed at 11 o'clock A. M. this 8th day of Mar., 1917. P. J. Farley, Clerk. By A. L. Jones, Deputy.

[Endorsed]: Certified Copy of Record. Filed Mch. 12, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [7]

In the District Court of the United States, in and for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Motion to Require Plaintiff to Elect.

Comes now the above-named defendant and moves the Court to require plaintiff to elect upon which alleged cause of action he relies, namely: Whether one under the common law, or one under the so-called "Employers' Liability Law or Arizona.

That plaintiff has filed a Complaint, first cause of action of which is based upon negligence, as grounds for recovery against defendant; second cause of action of which is based upon the Employers' Liability Law of Arizona, and without negligence on the part of defendant; that said causes of action are based upon the same transaction; that the same are inconsistent, and that defendant requires that plaintiff, at this time, elect upon which cause of action he relies.

LE ROY ANDERSON,
Attorney for Defendant.

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Nick

Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation. Defendant. Motion to Require Plaintiff to Elect. Filed Mch. 16, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [8]

In the District Court of the United States, in and for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant,

Demurrer and Answer.

Comes now the defendant above-named, but not waiving its Motion heretofore made, for Answer to the First Cause of Action in said Complaint says that it demurs to the same upon the following grounds, to wit:

I.

That it appears upon the face of said Complaint that plaintiff's injury was occasioned wholly by and proximately resulted from the ordinary and usual risks of the employment in which he was engaged at the time and place thereof, which risks were assumed by him in entering upon and continuing in his said employment.

II.

That it appears from said Complaint that the in-

juries complained of resulted from and were caused by the negligence and improper conduct of plaintiff.

III.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

IV.

That said Complaint has commingled therein an alleged cause of action against defendant for negligence, and an alleged cause of action against defendant for liability under the Employers' Liability Law of Arizona.

That there is an attempt to charge two causes of action growing [9] out of the same transaction, and an attempt to hold defendant liable under two different laws for the same thing.

That said Complaint is inconsistent and by reason thereof and the allegations therein, does not state a cause of action, in this, to wit: That in one instance it is alleged that said injuries occurred by the negligence of defendant, and in another that they were occasioned by a condition of his employment.

WHEREFORE, defendant prays judgment as to the sufficiency of said Complaint in the particulars hereinabove specified, and that plaintiff take nothing thereby, and for its costs.

LE ROY ANDERSON,
Attorney for Defendant.

MATTERS IN BAR OF THE ACTION.

Comes now the defendant, and not waiving any of its Motions or Demurrers hereinbefore interposed, says, by way of Matters in Bar of the Action:

I.

That the defendant admits the residence of plaintiff and defendant, but denies each and every, all and singular, the other allegations of said Complaint except as hereinafter specifically admitted.

II.

Admits that on or about the nineteenth day of March, Nineteen Hundred and Sixteen, the plaintiff was in the employ of defendant as a miner.

III.

Admits that on said date said plaintiff was injured, but denies specifically, at the time of said injury said plaintiff was in the exercise of proper care and caution for his own safety.

IV.

Denies specifically that said plaintiff was injured by reason of any negligence and carelessness on the part of defendant, or any of [10] its servants, agents, or employees.

V.

Denies that plaintiff, at the time of his injury, was in the exercise of due care and caution for his own safety. Denies that he was, at that time, in the course of his employment.

VI.

Denies that defendant's servants, negligently and carelessly, and without giving any warning to plaintiff, discharged or exploded dynamite, gunpowder, or other explosive, to the injury of plaintiff, and without notice to him, but alleges the fact to be that at the time of plaintiff's injury that he was not in the discharge of his duties; that he was an experienced

miner and knew that at the time of his injury it was the time, and that he was in the place for blasting; that he went, for his own pleasure, past the place of said blasting, and after due and repeated warnings as to the danger thereof; that if plaintiff had stayed at the place of his employment and had not gone to another part of the mine, for his own pleasure, he would not have been hurt; that if he had obeyed the warnings of defendant's servants, relative to said blasting, he would not have been injured; that if he had observed and remembered the rules for blasting, in vogue in said mine, that he would not have been hurt; that plaintiff was injured solely and wholly by his own fault, and by his failure to exercise for his own protection that degree of care and caution required of him by law.

VII.

Admits that plaintiff was injured at that time, but denies that he was injured to the degree, and in the manner, as set forth in said Complaint.

VIII.

Denies that he is injured to the extent of Sixty Thousand Dollars by reason of the negligence of defendant. [11]

IX.

Defendant alleges that plaintiff was injured by his violation of the rules and regulations of defendant company, promulgated for the safety of himself and his fellow employees, and that his violation of the same was the proximate cause of the injury and would not have occurred but for his violation of the same.

X.

That plaintiff was injured by one of the usual and ordinary risks of his employment, which risk plaintiff assumed upon entering the employment of defendant.

XI.

That notwithstanding the foregoing, and notwithstanding the fact that defendant exercised every reasonable care and caution to protect plaintiff and his fellow-workers, and to promulgate rules and regulations for the safety of plaintiff, and his fellows, defendant, previous to the filing of this suit, tendered to plaintiff Four Thousand Dollars—($4,000.00) in full settlement of all claims against it under any law of the State of Arizona, and hereby tenders said Four Thousand Dollars ($4,000.00) under this Complaint or any cause of action thereof, or any combined cause of action thereof, in full settlement of all claims against it, under any law of the State of Arizona, but not as an admission of any negligence or carelessness, or want of care, on its part, but as a business policy and to share its part of the burdens of hazardous employment, and that it hereby tenders said Four Thousand Dollars ($4,000.00) in full satisfaction of all such burdens laid upon it by any law or constitutional provision of the State of Arizona.

WHEREFORE, defendant prays that plaintiff take nothing by his said suit, save and except the sum of Four Thousand Dollars ($4,000.00) hereby tendered.

LE ROY ANDERSON,
Attorney for Defendant. [12]

In the District Court of the United States, in and for the District of Arizona.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Answer to Second Cause of Action.

PLEA IN ABATEMENT.

Further answering said Complaint, and not waiving any of its Motions, Demurrers or Answers, heretofore made, defendant, for further Answer to the alleged Second Cause of Action of said Complaint, says:

I.

That it appears from the Second Cause of Action of said Complaint that said action is brought under and by virtue of Chapter VI, Title XIV, of the Revised Statutes of Arizona, 1913, and that said law, in that it imposes upon defendant the liability for injuries sustained by plaintiff without fault or negligence on the part of defendant, is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant and other persons similarly situated of their property without due process of law, and denies to the defendant and other persons similarly situated the equal protection of the law.

II.

That it appears that said Act mentioned above was enacted under the mandate of Section 7, Article XVIII of the Arizona Constitution, and that said provision of the Constitution is null and void and in violation of the Fourteenth Amendment to the Constitution of the United States in that it imposes upon defendant and other persons similarly situated, liability for injuries sustained by plaintiff, while said injuries were not in any manner due to or caused by the fault or negligence of this defendant. [13]

III.

That said provision of said Constitution is in further violation of the Fourteenth Amendment to the Constitution of the United States because it deprives this defendant and other persons similarly situated of their property without due process of law and denies to them the equal protection of the law.

WHEREFORE, defendant prays that said action abate, and that plaintiff take nothing by his said Complaint and for its costs.

LE ROY ANDERSON,
Attorney for Defendant.

DEMURRERS.

FURTHER ANSWERING said Second Cause of Action of said Complaint, defendant, by way of demurrers, says:

I.

That it appears upon the face of said Complaint that plaintiff's alleged injury, if any he suffered, was occasioned wholly by and proximately resulted from the ordinary and usual risks of the employment

in which plaintiff was engaged at the time and place thereof, which risks were assumed by plaintiff in entering upon and continuing in his said employment.

II.

That it is not sufficently alleged or shown by said Complaint that said alleged injury was caused by any accident due to a condition or conditions of plaintiff's employment.

III.

That it appears from said Complaint that the injuries complained of resulted from and were caused by the negligence and improper conduct of plaintiff.

IV.

That it does not appear from the facts alleged in the Complaint that the alleged injuries was not caused by plaintiff's own negligence. **[14]**

V.

That said Complaint does not state facts sufficient to constitute a cause of action against this defendant.

VI.

That said Complaint simply alleges that said accident arose out of and in the course of said employment, and does not allege facts which show such a condition or conditions.

VII.

That it appears upon the face of said Complaint that this action is brought and relief sought under and by virtue of Chapter VI, Title XIV, of the Revised Statutes of Arizona, 1913, commonly known as the Employer's Liability Act. That said Act in that

it imposes upon the defendant, liability for injuries sustained by plaintiff without fault or negligence on the part of defendant is contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the law. That said law also violates Section 4, Article 2, and Section 13, Article 2, of the Constitution of the State of Arizona, in that it deprives defendant of property without due process of law and denies to defendant privileges and immunities which are granted to other citizens or class of citizens of the State.

VIII.

That said action appears to have been brought under said Employer's Liability Act, and that said Act was enacted under the mandate of Section 7, Article 18, of the Constitution of the State of Arizona, and that said Act and said Section 7, Article 18, of said Constitution of Arizona, are each null and void and in violation of the Constitution of the United States, Fourteenth Amendment thereof, in that they impose upon this defendant, a liability for injuries sustained by plaintiff, which said injuries are not in any manner due to or caused by the fault **[15]** or negligence of the defendant, and that said Act and said constitutional provisions attempt to impose liability upon defendant and others similarly situated, without fault or negligence on their part, and are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United

States, because thereby they reprive this defendant and other persons similarly situated of their property without due process of law and deny to defendant the equal protection of the law.

IX.

That the so-called Employer's Liability Law is unconstitutional and void, because of the fact that it is in violation of Sections 5 and 7 of Article 18 of the Constitution of the State of Arizona, in that it attempts to prevent the question of contributory negligence and assumption of risk, as defenses, to be submitted as questions of fact at all times to the jury. That by the Constitution of the State of Arizona, the defenses of contributory negligence and of assumption of risk, are preserved to this defendant and he is entitled to submit the same as questions of fact at all times to the jury, and that said law, in that it attempts to abrogate such defenses, is unconstitutional and void.

X.

That said Complaint alleges as a conclusion that plaintiff was injured by an accident arising out of and in the course of his employment and due to a condition or conditions of such employment, and does not allege facts which show such condition or conditions or the proximate cause of said accident and injury.

XI.

That plaintiff fails to allege, first, that said accident was not caused by his own negligence; or second, facts which show that said accident was not caused by the negligence of plaintiff.

XII.

That plaintiff alleges facts which show an attempt to commingle two causes of action, one under the Employer's Liability Law and one at common law and thereby fails to state any cause of action under either; **[16]** that said facts are inconsistent and indefinite and fail to state either a cause of action at common law or one under the Employer's Liability Law.

WHEREFORE, defendant prays judgment as to the sufficiency of said Complaint and that plaintiff take nothing thereby, and for its costs.

LE ROY ANDERSON,
Attorney for Defendant.

MATTERS IN BAR OF THE ACTION.

Comes now the defendant and not waiving any of the defenses hereinbefore interposed, says, by way of Matters in Bar of the Action:

I.

That the defendant admits the residence of plaintiff and defendant, but denies generally and specifically, each and every, all and singular, the other allegations of said Complaint except as hereinafter specifically admitted.

II.

Admits that on or about the nineteenth day of March, nineteen hundred and sixteen, the plaintiff was in the employ of defendant as a miner.

III.

Admits that on said date said plaintiff was injured, but denies specifically, at the time of said

injury said plaintiff was in the exercise of proper care and caution for his own safety.

IV.

Defendant denies that it or any of its agents were guilty of negligence, carelessness or improper conduct as to any of the matters set forth in said Complaint, or otherwise, or at all, and denies specifically that said plaintiff was injured by reason of any negligence and carelessness on the part of defendant, or any of its servants, agents, or employees. [17]

V.

Denies that plaintiff, at the time of his injury, was in the exercise of due care and caution for his own safety. Denies that he was, at that time, in the course of his employment.

VI.

Denies that defendant's servants wantonly, negligently and carelessly, and without giving any warning to plaintiff, discharged or exploded dynamite, gunpowder, or other explosive, to the injury of plaintiff, and without notice to him, but alleges the fact to be that at the time of plaintiff's injury that he was not in the discharge of his duties; that he was an experienced miner and knew that at the time of his injury it was the time, and that he was in the place for blasting; that he went, for his own pleasure, past the place of said blasting, and after due and repeated warnings as to the danger thereof; that if plaintiff had stayed at the place of his employment and had not gone to another part of the mine, for his own pleasure, he would not have been

hurt; that if he had obeyed the warnings of defendant's servants, relative to said blasting, he would not have been injured; that if he had observed and remembered the rules for blasting, in vogue in said mine, that he would not have been hurt; that plaintiff was injured solely and wholly by his own fault, and by his failure to exercise for his own protection that degree of care and caution required of him by law.

VII.

Admits that plaintiff was injured at that time, but denies that he was injured to the degree, and in the manner, as set forth in said Complaint.

VIII.

Denies that he is injured to the extent of Sixty Thousand Dollars by reason of the negligence of defendant. **[18]**

IX.

Defendant alleges that plaintiff was injured by his violation of the rules and regulations of defendant company, promulgated for the safety of himself and his fellow-employees, and that his violation of the same was the proximate cause of the injury and would not have occurred but for his violation of the same.

X.

That plaintiff was injured by one of the usual and ordinary risks of his employment, which risk plaintiff assumed upon entering the employment of defendant.

XI.

Denies specifically that plaintiff was injured by

an accident which arose out of and in the course of plaintiff's labor, service and employment, and which was due to a condition or conditions of such labor, service, or employment.

XII.

Defendant denies that plaintiff is totally and permanently incapacitated from doing any work and labor, but alleges the fact to be that at the time of said injury plaintiff was taken to defendant's hospital and treated by defendant's surgeons and nurses and given every care and attention and was later sent by defendant, at its expense, to a specialist, who gave plaintiff the benefit of every known treatment, and that plaintiff has partially recovered from said injury, and will not be totally and wholly incapacitated, in the future.

XIII.

That notwithstanding the fact that said accident and injury were occasioned by plaintiff's own fault, and were due to his own negligence, defendant, after said accident, tendered to plaintiff, the sum of Four Thousand Dollars ($4,000.00); said amount being the maximum amount allowed by the Compensation Law of Arizona for total incapacity. That this amount is hereby tendered, under this Complaint, or any cause of action thereof, or any other law of Arizona, as a full [19] settlement of defendant's obligations to plaintiff, and not in acknowledgment of any liability or fault upon the part of defendant, but as a business policy of defendant, and in full satisfaction of all obligations of defendant, and in full payment of all damages due from it by reason

of said accident, either under the Common Law of Arizona, relative to damages, Employer's Liability Law, or the Workmen's Compulsory Compensation Law of Arizona.

XIV.

That notwithstanding the fact that defendant was not guilty of negligence, which caused said injury, and notwithstanding the fact that plaintiff was guilty of negligence, yet, the law of Arizona provides—that when employees in certain hazardous occupations receive injuries that wholly incapacitate said employees from ever being able to re-engage in labor, in the same or other gainful employment, that the employer shall pay to the employee one-half of his average earnings when at work on full time, previous to the accident, with a proviso that the total amount of such payments shall never exceed Four Thousand Dollars ($4,000.00) either in the event of the death of the employee, or his total incapacity; that in compliance with said law, previous to the filing of this suit, and after the happening of said accident, defendant tendered to plaintiff, in full satisfaction of all claims under said law, or any other law relative to said accident, as a full discharge of all the burdens imposed by law upon defendant for the happening of said accident to plaintiff while in defendant's employ, and that defendant does hereby so tender said Four Thousand Dollars ($4,000.00).

WHEREFORE, defendant prays that plaintiff take nothing by his said suit, save and except the

amount herein tendered, to wit: Four Thousand Dollars ($4,000.00).

LE ROY ANDERSON,
Attorney for Defendant. **[20]**

[Endorsed]: L–30 (Prescott). In the District Court of the United States, in and for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Demurrer and Answer. Filed Mch. 16, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Law Offices of Le Roy Anderson, Prescott, Arizona, Attorney for Defendant. **[21]**

In the United States District Court for the District of Arizona.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 16, 1917—Order Sustaining Motion to Require Plaintiff to Elect, etc.

This cause coming on for hearing on the motions heretofore filed herein, the plaintiff being represented by Joseph S. Jenckes, Esquire, and the defendant being represented by Le Roy Anderson, Esquire, the plaintiff withdraws his motion to remand this case to the Superior Court of the State of Arizona, in and for the County of Yavapai.

The cause then coming on for hearing on defendant's motion to require plaintiff to elect upon which alleged cause of action he relies, and the same being duly considered by the Court is by the Court sustained, to which ruling and action of the Court the plaintiff excepts. Thereupon, plaintiff, in open court, elects to stand upon the first cause of action mentioned in his complaint. Thereupon, defendant withdraws its motion to require plaintiff to make his complaint more definite and certain.

The cause then coming on for hearing upon defendant's motion to strike from plaintiff's complaint certain statements, and said motion being duly considered by the Court is by the Court overruled.

Thereupon, by leave of Court, plaintiff strikes from his complaint in line 4 of the first paragraph of the first count on page 2 the word "wantonly." Thereupon, the defendant, in open court, **[22]** strikes from its answer from the sixth paragraph in line 23 the word "wantonly."

The cause then coming on for hearing upon the demurrer of defendant, and said demurrer being duly considered by the Court is by the Court overruled.

The cause then coming on for hearing upon plaintiff's motion to strike paragraph 11 of defendant's answer, and said motion being duly considered by the Court is by the Court sustained.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 21, 1917—Trial.

This cause coming on regularly for trial this day, the plaintiff in person and with F. C. Struckmeyer, Esquire, and Joseph S. Jenckes, Esquire, his counsel, and Le Roy Anderson, Esquire, and James L. Coleman, Esquire, counsel for the defendant, appearing in open court, both sides announce themselves ready for trial.

Thereupon Lincoln H. Beyerle is ordered appointed and sworn as court reporter in this cause, and he is accordingly duly sworn in open court as such court reporter.

The Court thereupon orders the Clerk to call into the jury-box eighteen jurors, and their names are called and, all answering thereto respectively, take their places in the jury-box. Said jurors are thereupon duly sworn upon their *voir dire.* Whereupon, Lloyd L. Day is challenged by the defendant for cause and such challenge denied by the Court. Thereupon, juror B. F. Allen is excused by the Court for cause, and J. T. Hinds is called in his stead and duly sworn on his [23] *voir dire.*

Thereupon, juror John Condit is excused by the Court for cause, and Wm. G. Ellison is called in his

stead and duly sworn on his *voir dire*. All said jurors are found to be duly qualified and are accepted. Thereupon, each side strikes three names from the list, and the remaining twelve on the said list, as follows: Lloyd L. Day, S. W. Hodgson, Ben Doney, W. O. Hoogestraat, C. M. Archer, C. C. Castle, F B. Douglas, Fred L. Bradley, J. S. Kirk, Ralph R. Davis, D. B. Lovell and Wm. G. Ellison, are selected by the clerk and are duly sworn to well and truly try the issue joined between the plaintiff and defendant herein.

Thereupon, the plaintiff, by Joseph S. Jenckes, Esquire, one of his attorneys, reads his complaint and makes his opening statement; and James L. Coleman, Esquire, of counsel for the defendant, reads defendant's answer.

Thereupon, the plaintiff, to maintain upon his part the issue herein, calls Nick Kuchan, Mike Dragich, J. B. McNally and Tom Lesch, who were duly sworn, examined and cross-examined.

The hour of adjournment having arrived, and the trial of this case not being completed, IT IS ORDERED by the Court that the further trial hereof be and the same is hereby adjourned and continued until Wednesday, August 22d, 1917, at the hour of 9:30 o'clock A. M.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—August 22, 1917—Trial.

Trial of this case is this day resumed pursuant to to an order of continuance made on yesterday, plaintiff in person, counsel for both [24] sides, and all jurors, being present in open court.

Mike Dragich is recalled and cross-examined and examined in redirect.

Tom Lesch is recalled and cross-examined.

George Kuchan is called as a witness upon behalf of the plaintiff, and is duly sworn, examined and cross-examined.

Thereupon the plaintiff rests his case.

Thereupon the defendant, by its counsel, moves the Court to instruct the jury to return a verdict for the defendant, which said motion being duly considered by the Court is by the Court denied.

Thereupon, the defendant, to maintain upon his part the issue herein, calls as a witness L. P. Call, who is duly sworn, examined and cross-examined.

Thereupon the defendant rests its case.

Thereupon the defendant, by its counsel, moves the Court to instruct the jury to return a verdict for the defendant, which said motion being duly considered by the Court, is by the Court denied.

There being no further testimony offered and the case being closed, argument of counsel is had; the Court instruct the jury orally, the plaintiff excepting to that part of the Court's instructions to the jury as shown in the reporter's transcript of the testimony for the reasons contained in said transcript, and the defendant excepting to the portions of the

instructions of the Court as shown in the reporter's transcript of the testimony for the reasons therein set out.

Thereupon the jury retire to their room in charge of Joe Delavigne, bailiff, first duly sworn for such purpose, to consider of their verdict. After a time said jury return into court, in charge of their bailiff, and, upon being asked if they had agreed upon a verdict, through their foreman, state that they have agreed. Whereupon said jury, through their foreman, present their verdict, as follows, to wit: [25]

"NICK KUCHAN,

Plaintiff,

against

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at the sum of $25,000.00 and court costs.

W. O. HOOGESTRAAT,
Foreman."

And the clerk inquiring of said jury if such is their verdict, they state that it is, and so say they all. Thereupon said jury is ordered discharged from the case.

Judgment.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment entered

in favor of the said plaintiff and against said defendant in the sum of $25,000.00 and the further sum of $69.60 costs, in accordance with the verdict of the jury.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court—October 24, 1917—Order Denying Motion for New Trial.

The motion for new trial filed herein by the defendant, having been heretofore argued to the Court by respective counsel, and same having been taken under advisement by the Court, and said motion having been duly considered by the Court, the same is now by the Court denied, to which ruling and action of the Court the defendant excepts.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Fixing Amount of Supersedeas Bond.

IT IS ORDERED that the appeal bond of the defendant be fixed at $30,000.00, as per stipulation of

counsel in open court, and that [26] defendant be allowed fifteen days in which to file said bond.

IT IS FURTHER ORDERED, by agreement of counsel, that no execution shall issue herein pending the filing of said appeal bond.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Order Extending Time Sixty Days to Prepare, etc., Bill of Exceptions.

IT IS ORDERED that the defendant be and it is hereby granted sixty days from this date in which to prepare and tender its bill of exceptions in this case.

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Minutes of Court November 6th, 1917—Order Extending Time to November 18, 1917, to File Appeal Bond.

IT IS ORDERED that the time heretofore fixed in which the defendant might file its appeal bond, be

and the same is hereby extended to and including November 18th, 1917. [27]

In the District Court of the United States for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 21st day of August, A. D. 1917, the above-entitled cause came on for trial at Prescott, Arizona, upon the issues joined herein, before the Hon. William H. Sawtelle, a Judge for the District Court of the United States for the District of Arizona, and a jury duly impanelled and sworn. Whereupon the parties respectively offered and introduced the following evidence and exhibits of evidence, and offers of evidence, and the following evidence and offers of evidence were rejected and objections and motions were made and rulings of the Court entered and exceptions duly taken by the parties, all as follows, to wit:

APPEARANCES:

STRUCKMEYER & JENCKES, Esqrs., for the Plaintiff.

ANDERSON, COLEMAN & NILSSON, Esqrs., for the Defendant.

PLAINTIFF'S EVIDENCE IN CHIEF.

Defendant admits American mortality table (3).

Testimony of Nick Kuchan, in His Own Behalf.

NICK KUCHAN, plaintiff, a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. STRUCKMEYER.

My name is Nick Kuchan. I was born in Austria, December 6th, 1885, and was thirty-four years, three months and a half old on March 19th, 1916, the day I got hurt. I stayed in Austria until I was nineteen years old (7) and then went to Quebec, Canada. I was railroading and [28] in the quarry business in Canada until August, 1914, and then went to British Columbia and Vancouver and worked there seven years, splitting stone and anything like that. I was naturalized in Canada and am a British subject (8). I came to the United States, to Seattle, about August 16th, 1914, and then went to Frisco and then to Jerome, Arizona, where I started to work for the United Verde Copper Company September 21st, 1914. I worked for them up to the time I was hurt March 19th. I first worked for them around the metal chutes. I was doing timbering work at the time I got hurt and was getting four and a half or four and a quarter (9). I worked all the time in Canada and in the United States, ex-

(Testimony of Nick Kuchan.)

cept when I was hurt at some place.

On the 19th of March I went to work at 7 o'clock in the evening on the 700 level. I was timbering way back of the station—300-foot shaft. It was way back, pretty near to the end of the mine. It was only about 4 or 500 feet of that drift behind where I was hurt. I was working at the 6–I stope. I worked until 11 o'clock (10). At 11 o'clock the miners go to lunch. Mike Dragich, my partner, was working with me in the 6–I stope; also Tom Lesh and some other men and Ed Isaacson and some other Mexican man and two muckers and two miners down there all together. At lunch-time the miners were going to blast. They had over 40 holes which they put in three or four days. At 11 o'clock they were going to fire their blast.

We went out—it is the old station right close to that 6–I stope, only about five or six walls between there, and we eat lunch right in the old station, and there was water right close about 40 feet from there and we all had lunch buckets and we went out there, everyone after the other, and started out there to get away from the gas and smoke and there is the best place to lunch, we always going that way, and we started out one after the other and walked probably about 150 (11) or 200 feet or something like it, and when we was so far from that place where we were working I saw a pile of muck and *muck and* rubbish, and [29] Mike Dragich was walking ahead of me and so one after the other, and I just kept walking to get by the muck and all I know I

(Testimony of Nick Kuchan.)

lost my consciousness and I never knew what happened to me for several weeks afterward, when I found myself in the hospital.

I was going from the "I" stope about 200 feet to the main raise to eat lunch. I had passed the station. The blast went off 150 or 200 feet on the other side of the station. I could not eat my lunch at the station because there was going to be gas and smoke right close to the stope where we were working. Between the station and the stope is only about 4-foot wall between. I don't know how many men walked with me to eat lunch, but we all went out to the station and took the buckets when we started out (12). I don't know—for all I know only the miners were left there in the stope to light the shots. I believe there were 7 or 8 of us went to eat our lunch. As we walked in the drift over to the place where we were going to eat, nobody warned me or gave me any notice of the explosion or the discharging of dynamite or other explosive.

We had been over at this raise to eat lunch. We go that way when the men blasting the 6–I stope. We had been over to that place about two or three times (13). When the miners were not blasting in the stope we would eat our lunch right close to the station, right close to the stope. I worked in this particular drift or stope from March 6th until March 19th, 13 days. The place where the explosion was was the main drift. I did not know in any way that they were going to fire off explosives in that drift when I passed through or when I was ap-

(Testimony of Nick Kuchan.)

proaching the place. I knew nothing about it. I did not smell or hear any fuse burning or see any fuse burning (14). There were no lights in the drift, because they had the lights off on account of the blasting. We had only miners' carbide lights on our hats. I believe I was unconscious in the hospital several weeks. I stayed in bed about two months. My eyes were entirely gone from the accident. Before that they were good. Before the accident I was [30] healthy, never sick in my life (15) and my hearing was fine, and there was nothing the matter with me. Now, my left ear is crushed; I couldn't hear anything, and the right one is weak. When I hear such things on the street I could hardly hear nothing around me. On my left arm the little finger is dead and the rest I couldn't hardly feel them and I hardly have any grip at all. I couldn't use my left hand very much. When I eat I got to put piece of bread in it and take the other hand and help it up. My left shoulder and arm is dead up here and when I touch myself it is like cramp and like I would sleep on it (16). The left part of my body was in bad condition (17).

Cross-examination by Mr. ANDERSON.

I had worked as a miner before I was hurt about three and a half or four months in this same mine. I was timberman about 13 days, and about two months I was working metal chutes, that is about 6 months altogether working for the United Verde. I knew that they blasted in the mine about 11 o'clock at night and that they set that blast just the

(Testimony of Nick Kuchan.)

time when we eat our lunches. They always set their fuses, or spit them before we went to eat our lunch.

In the stope we were working just before I was hurt the miners in there had set their fuses just before we left (18) and I knew they were going to blast in the stope where I had been working and I knew they were blasting all over the mine at that time, if they had any blasting to do. It was blasting time, when they had to blast, I suppose, all right, at that time. I and the other boys who were working up in the stope came back to the station, the old station,—No. 2 station was right close to that stope where we had our lunch baskets,—6–I stope where we were working. We got our lunch baskets at the station where we generally ate our lunch when they were not blasting. There were 6 or 7 of us around the station, maybe more, as there was 10 of us altogether working in the stope (19), and a miner was left to spit the fuse. I don't know whether some of them wanted to go one way [31] and some another to eat their lunch, because I was second man in the line. I did not notice any discussion about going anywhere else to eat lunch.

I don't know Martin Lazar and never saw him in my life. The explosion was about 150 or 200 feet from where we were working. I did not know that Lazar was drilling up in that drift (20).

"Q. You knew this, that if a man was drilling what he was drilling for, don't you?"

"A. Well, I know that, but I didn't know that

(Testimony of Nick Kuchan.)

somebody was working there because nobody was working before there that I noticed."

Sure, I would know what he was drilling holes for if I knew he had been working there drilling holes. I knew he would be blasting if at all, about 11 o'clock, if he got through; if he didn't, he would blast, at quitting time. They always blast either at 11 o'clock or at quitting time. The blasting period covers 10 or 15 minutes, that is, they go to where they are going to blast about 20 minutes before lunch and before quitting time and they blast at the same time all over the mine, so that if there is any blasting done at all it is done at about 20 minutes of 11 or 20 minutes of quitting time (21).

We went from the stope to the old station and got our lunch baskets. I didn't have any words about eating at any other place. All of us started out in that drift—some of them probably went over to the cross-cut. I did not notice any other places where some of the others went to eat (22). We all ate at this one place every day before. I didn't see any men working up this main drift at all. Mike Dragich was first and I was second. There was a cross-cut running from the station and in that cross-cut they were not safe at all, because smoke goes right on that cross-cut from the blasting there. The vent (23) comes right from where we go to lunch from the main drift. The station is the big place where the cages go up and down. It was old station—they raised the main shaft and there is a waste chute there. Now they use the [32] raises in the

(Testimony of Nick Kuchan.)

waste chute. From the station there is a drift from the old station, No. 3 and No. 4, but it was too wet and muddy from the water dripping from the roof. There is no place to stay for lunch and that is the reason we go in the main drift where we go before. I don't know any other drifts there except two on the cross-cut about 300 feet away from the old station (24). We were working near the station—a wall about 4 or 5 feet between. From the station to the point where they were blasting was about 200 feet from the old station.

I was hurt up the other drift about 200 feet from the old station, which is close to the 6–I stope. I don't know when before I had been up the drift where I was hurt, because only two or three evenings when the miners put all the holes in the spots and going to blast, and then we was going that way. I had not been up to eat my lunch at this place for a month or so. I was only working 13 days on that stope. I had eaten my lunch about two or three times during that time. I don't know how long before I had been up this drift. I suppose it was about, well, 4 or 5 or 6 times, something like that. I did not see the others blasting where I was hurt (25).

I don't know whether Martin Lazar was on the same shift or not. I didn't know somebody was working there. Jack Cady was my shift boss. He was around there between 9 and 10 that morning. I was hurt at about 11 o'clock at night. We started up to the 800 raise to eat our lunch that night about five minutes before 11. Mike Dragich was ahead of

(Testimony of Nick Kuchan.)

me. When we got along to a certain place I saw some muck there (26). I don't know what it came from because on that drift when I was passing that drift a month or so, I was working that raise on 700 some time before and I was passing there, that main drift come down, caved, and I see that muck there. The explosion took place where the muck was. The air from the ventilator was coming down the drift toward me and toward the station, except some going out through the cross-cut. From the station to the stope most of the ventilation would go down a curve [33] and a cross-cut so there would not be much air ventilation go from the station to the stope. We could have gone up to the 800 raise—that is the main air (27), there is one man-way I know to the 800 level, in that drift in which we were going to eat lunch.

No shift boss or anybody told us to go up the drift to eat our lunch on the 800 raise. That was the only place we could go that we could be safe from gas. It was not part of our work to go there, but I had to go to lunch that way. I went up there to eat my lunch (28), and I had not been working up there at all. It was 400 feet away from where I was working, the man-way from the 800. I know what muck is. The shots put muck out. I didn't know there was muck there from the blasts. I was through the main drift before and most of the time muck was there on the drift from the cave coming down there. I knew muck showed that there had been blasting there, but what can a man do when he comes up in the muck

(Testimony of Nick Kuchan.)

when the shot gets him right there?

I have been in America 16 years. Was born in Austria (29). I have one brother in the Austrian army (30). My parents live in Austria. I don't know how many men were at the station before I went to eat my lunch. There was a few of them come down to the station before I had come down from the stope. I didn't see anybody there except the men working in the stope. Mike was first, then me and then the others. I didn't see other men eating their lunch around the station when I came down (31). There was no water at the 800 raise, but water pretty close to that No. 2 shaft. There was water at the station. I did not see John Koch, Martin Lazar or Domingo at the station. Nobody was eating lunch at the station. The only men that came out of the stope where I had been working was drinking water right close to the station when we was there. I don't know who they was. At the same time, when we all took lunch baskets and started. From the old station up to the 800 raise is between 300 and 400 feet (32). We was intending to go 2—or 300 feet that way, because there was a drift from the main drift where we all stay and eat lunch, and that is the place we stay all the [34] time when we go to lunch there.

When I was hurt I was working as a timberman in the 6–I stope. There was 10 of us working in that stope (33).

Testimony of Mike Dragich, for the Plaintiff.

MIKE DRAGICH, a witness on behalf of plaintiff, being duly sworn, testified as follows:

I have a pool-hall at Jerome, Arizona. I am thirty-seven years old. Before I had the pool-hall I did mining. I followed it about 6 years. I was working on March 19th, 1916, for the United Verde Copper Company at the 6–I stope, on the 700-foot level. I worked for the United Verde from 1910 to March 19th, 1916, the date of this accident (34).

On the date of the accident Nick Kuchan was working with me. We were both timbermen. We had worked about 13 days on the 6–I stope. Kuchan was my partner. We had worked in other places in the mine as partners (35). We usually went to work at 7 in the evening and worked 8 hours, from 7 until 3. We would quit work at 5 or 10 minutes to 11 and have half an hour for lunch, from 11 to 11:30. We were eating on company time. Numerous men were working besides Nick Kuchan and I in the 6–I stope that evening (36), about 8 or 9 men. We ordinarily eat when we quit our work. Wanting to eat our lunch at the 700 station just as we did before. There was miners blasting there and numerous others. I don't know how many there was, and they would say, "You fellows go around over here; we going to blast." The miners at the stope where we was working said that. We took our tools and go to station and took our lunch and went to eat lunch. We did the same as we had done before. We eat the lunch in the station—we can't eat our lunch in the

(Testimony of Mike Dragich.)

station because be smoke there. Of course, great many holes—you know that make smoke and gas. Then we talk among ourselves where we going to eat our lunch. Some of us we go the other way and some of us we go to the 5–I raise, but most of us we said (37), [35] "Well, this best place for us to eat our lunch because nothing be here, there is no smoke and there is not any danger," and finally we all go outside to go there and eat our lunch and began to walk there.

About 7 or 8 of us start over there to eat our lunch. The station is about 30 feet from the stope. The drift we are walking in going to the place to eat our lunch was a cross-cut, it was drift, cross-cut. It was the main drift. They were running car through. Men going to and from through there. There was blasting one time, but I didn't know it was blasting. I didn't know before that there had been any blasting there. Before we come to this place in the drift I or any of the 6 or 7 in the crowd did not receive any warning that they were going to fire a shot (38). We were walking not very far between us, close together. I was first and Nick Kuchan was next and the rest of us followed. The tunnel is 6 feet high and 6 feet wide. Before I came to the point of the explosion I did not smell or hear any burning fuse. There was no indication of anything to give me notice. If there was I surely go backward, but I can't smell of any kind of odor and can't see any smoke and can't see nothing there. No man there at all to give warning by waiving a hand or talking.

(Testimony of Mike Dragich.)

I did not see burning fuse (39). When we came to the point of the explosion I look at the face of wall. I can see no smoke, no fuse. I look at it and—of course I see man drilling there before—and I look at face and I can't see any indication at all and I continued to walk without any danger—I didn't frighten any at all. Just taking a kinda step you know, and I stop right on top of muck pile. When I come to that spot I get the shot from the face and the shot took me up and threw the headway about 3 or 4 yards. That shot was just sudden—like out of that—I can't distinguish what it was. I landed in the ditch for a second until I got sober and then I started to crawl headway. The explosion came from the side wall. I can't tell this very exactly. [36]

I had work in the mine a long time (40). I knew the purpose of the drilling. At the place where the explosion came out of the wall you can't tell nothing but wall there. Only hole there and one hole there. I do not know what was on the other side of the wall. They had been putting in a raise there. The raise from the 800 up to the 700 (41).

Cross-examination by Mr. ANDERSON.

I had worked for the United Verde about 6 years before this accident. I was mucking about a couple of months and then was a miner. I was quite familiar with the mine and the locations around there. I knew Nick Kuchan. We were working as partners when he was injured. On the date of the injury we were working about 300 feet east of

(Testimony of Mike Dragich.)

the old station. That is where the blasting was to be. At the station we would be about 300 feet from the blasting (42) in 6–I stope. When we were at the station where our lunch baskets were we would be that distance from where the blasting was taking place back in that stope. We was out there about 9 minutes to 11 in the station. They had not blasted yet back in our stope. They had started to spit. About 5 minutes before they went to spitting we left the place. The wall of the stope, which was 30 feet from the station, was the nearest end of the stope to the station. They was blasting about 45 feet back in the stope (43). I came out to the station with Nick and some other men around there, 7 or 8, all of us together. We discussed among ourselves whether we would go to the south and eat our lunch, or whether we would go up to the north to the 800 raise. I decided myself to go to the 800 raise because we ate our supper 3 or 4 times there. Into that place in the 6–I stope we go from there and eat our lunch there. Some of us wanted to go the other way and the majority of us say to go to the 800 raise. That was about 3 or 400 feet to the north (44). We could have gone to the south, and been away from the gas and explosion in our stope if we wanted to. Of course, we were in a hurry because [37] it was late and those fellows want us quit that work and get away. We could have gone to the south down to the other raise there and we would have been away from this gas, but we decided to go to the north.

(Testimony of Mike Dragich.)

I knew Martin Lazar was drilling on this place where the trouble took place. I saw him. He was drilling there about nine o'clock. That was about two hours before the blasting took place. Being an experienced miner I knew what drilling was for. I was awful skillful regarding any shot because I had a great many others on my hands. I led these men—Kuchan was behind me—I was first people.

"Q. And you were looking, watching out to see if there was any blasting there?" (45)

"A. I didn't pay any attention to that at all because everybody there thought it wouldn't be dangerous there at all."

The best place for us to eat our lunch, that is what we decided on the station. As I approached the place I looked there. I see the muck pile there and at the wall. I can't see any smoke and can't see any odor of powder and can't see burning fuse, can't see nothing and I say, "That is a good place for us to eat lunch?" We passed, continuing our walk. We never looked for any danger or anything like that, nothing at all.

"Q. You took the chance, you went on chance, you knew drilling had been there?"

"A. We took no chance. We say, there, place there for us."

I don't know if Nick knew or not that Lazarre was working there. I saw him. I was there about nine o'clock. I went in along there and I saw he was drilling there. Nick was in the stope when I was there—because we can't be together all the time.

(Testimony of Mike Dragich.)

I go to look for wedges and blockheads (46).

Our business didn't call us up to the 800 raise. We didn't have to go up there, but we was kinda afraid of the smoke. We went up there because we thought it would be a better place to eat our lunch. Some of the others thought that the drift to the south would be a better [38] place. We could not have gone to the 800 raise without going past the place where Martin Lazar was working (47). Well, we could over there. (Indicating on map.) Over there was the other stope and they was blasting there too. There was a place right there where we could come past. This map seems different than the situation at that time. There was no other stope there. We can't pass there (indicating) (48), you can't pass only this way.

Some of the other men say go this way. That is north or south from the station, I don't know, I can't tell in my mind, you see. We went to the west. As an experienced miner I knew as all other experienced miners do, that the blasting, if it was to be, would be at about 10 minutes to 11 or 10 minutes to 3, along there, covering 10 to 15 minutes time. Some blasted sooner and some later. As an experienced miner, if I was going into another drift from the one in which I was working at that time, I would look out to see whether there was any blasting in there (49). So would any other miner. There were 7 or 8 men on the station when we came out of our stope. There were some others, coming along from the drift. I can't tell exactly how many

(Testimony of Mike Dragich.)

there was. I didn't say anything to Nick about seeing Martin Lazar drilling in this place. I did not see anybody, or say anything to anybody or to any one of these men that were going with me. I didn't give them any warning that Lazar had been drilling there. I don't know if any one else was working with Martin Lazar on this drift toward the 800 raise. He was working alone when I passed through. There was no other work going on there (50) and no other men up that way.

There was no water up there at the 800 raise except copper water—no drinking water. The drinking water was in the station where we left our lunch and that was where we usually ate our lunch. Everybody in the mine knew that we men usually ate our lunch on the station. The reason we did not eat our lunch in the station that night was because we thought the gas would come in there from where they were going to blast. [39] We went up to the 800 to get away from that. Some of the boys wanted to go to the south to get away from it, but I voluntarily selected this place myself. We decided that would be the better place for us. Nobody told us to go up there. Nobody ordered us, no boss or shift boss or otherwise (51). We had no work to do up there. The usual thing was for all of the men working in that stope to eat their lunch on the station.

I don't know whether any of the other men knew Martin Lazar was working up there. I didn't tell any of them. I know what Martin was drilling

(Testimony of Mike Dragich.)

for, sure, I knew he was drilling there because I knew there was a raise there all right. I knew he was drilling a hole in which to blast and I knew, as an experienced miner, that was exactly what was going to happen there. I knew this before I went past there. I went back to my work (52). I knew that was the time they were going to blast, if they blasted. I was the first man in the line yet I didn't say anything to Nick nor to any of the others. I never mentioned it because I never expected to be shot there. I saw him (Lazar) drilling, but if he blasted there must be guarded place. I knew, as an experienced miner, that if I passed a place where a man was drilling at blasting time I should be on the lookout for those things and take precautions for myself. It is a rule in the mine that whenever you know a man was drilling you should not pass his place at blasting time without inquiring and knowing (53). I knew he was drilling there, but I didn't know he was going to blast there. He didn't tell me. Ordinarily I take the precaution to inquire and ask. I knowed spot going to blast there must be guarded place (54). Men were passing. Nobody was working there except Martin Lazar. Martin Lazar was working in the drift by himself and all us men were working over at the east stope.

When we were discussing with Nick and the other miners at the station which way to go to eat lunch we assembled everybody together. There was some fellows, I don't know who they was—we go to the

(Testimony of Mike Dragich.)

south and the [40] other fellows we go west. I said myself, "We got to the 800 raise where we eat our lunch the night before last." That seemed to be the best place for us. I don't remember how Nick voted. I don't know which way he wanted to go. We had eaten lunch at the 800 raise some two nights before, or three (55). I don't know if Nick was with us at that time. There was a couple of muckers and a miner with me; there was four or five of us eat our lunch before. That is the way we chose that place to go there again.

Nick was working with me all the time on the night shift. Sure we could have gone to the south to the other ore raise and gotten out of this smoke. We could have gone around to the 5–K stope and come to the 800 raise. There was two different ways we could have gone from the station and gotten away from the gas. We could go to the south and that cross-cut, and we could go to the 5–K to the main drift and to the station over there, but it was awful far.

There is only one drift to the south (56). The ventilation was the best over there to the 5–Y. When we came out of the stope I didn't see anybody at the station other than the men working with me, except when we started to go over there where we decided to go I saw a man over along the drinking water. He was drinking water or washing his hands, I don't know for sure—I saw him. He was not working with us—not one of the men with us. I

(Testimony of Mike Dragich.)

don't know whether or not his name was John Koch (57).

Redirect Examination.

When I went over there at about nine o'clock and saw Lazar drilling there Kuchan was not with me. I was alone. I went to work at 7 o'clock to the 6–I stope up the drift—south. It was not through the drift in which the explosion afterward took place (58). [41]

Testimony of Dr. J. B. McNally, for Plaintiff.

Dr. J. B. McNALLY, a witness on behalf of plaintiff being first duly sworn, testified as follows:

My name is J. B. McNally. I am a physician and surgeon practicing at Prescott, Arizona. I have practiced for twenty-three years. I know Nick Kuchan and made a physical examination the day before yesterday. His eyes are destroyed. Not only is the vision destroyed, but also the eyeballs and part of the bone (59). His face is injured by powder and small sand. It was healed up leaving quite a bit of scar tissue around. It will leave scars. The left eyeball is mattering. It is a serum or secretion coming from the lacrimary sack and over all the tissues around there that has been injured. His ears, also, have been injured. The eyeball socket will continue to heal with the scar tissue and then it will have to have an opening for secretions to pass out. It may require further operation, but it is uncertain (60). I cannot figure out the possibility of putting in glass eyes. I think

(Testimony of Dr. J. B. McNally.)

a glass eye could be put in the right eye. The left ear is lacerated and the drum destroyed. There is not a total loss of hearing from the use of the right ear if you speak loud to him. The other ear is also injured (61). The ear is slightly lacerated. It may require a little bit further treatment. I think his hearing will always be impaired. I examined his left shoulder. There are a good many small wounds. A perforation of the skin beneath the collar-bone, and another on the anterior part of the shoulder. The locomotion appears to be impaired some. I do not think he is paralytic. I think it is incident to having had a good deal of worry for a long time and incident to the trial here (62).

Cross-examination by Mr. ANDERSON.

In my opinion, with use the left arm will get better all the time. I do not think it is paralyzed (63).

[42]

Testimony of Tom Lesh, for Plaintiff.

TOM LESH, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Tom Lesh. On March 19th, 1916, I was working on the 700 level in the 6–I stope. I had supper before and I saw miners were blasting. I got to go to another place. At 11 o'clock I go with them fellows to eat. Nick Kuchan was with us. Also Mike Dragich. I was fourth in line. Dragich was in front, Nick was next (64), Isaacson was after that and I was after Isaacson. I had worked down there for the company about three

(Testimony of Tom Lesh.)

years. I followed these men. When other fellows were going to blast and I can't stay that place I got to go somewhere (65). When I went up there with the other men there was nobody standing to warn me off. Nobody tell me. I not going to blast (66).

Cross-examination by Mr. ANDERSON.

Mike Dragich did not say anything to me about seeing a man drilling there. Mike was first in line. I never seen nobody—just about 7 or 8 in the line and I was fourth. I was going with them because we got to get away from that stope. Going to blast. I had eaten my lunch before and I had no place to go. I was working in the 6–I stope. When they stopped at the station nobody spoke with me (67). They didn't talk with me about which way they would go. They did not tell me which way they would go to eat their lunch. Mike and Nick and those boys did not discuss where they would go to eat their lunch—we just go together. They all wanted to go to the same place.

I have worked in the mine over three years. I was born in Austria. That night was the first night I knew Nick Kuchan. I never talked with him since the accident or with his attorneys (68). I never talked with Mr. Struckmeyer. Yes, I talked with Mr. Struckmeyer the first time I see him on Sunday here; —that is all I seen of him. [43]

Nobody was working on the station when I got out there. I not know much. I not work out in them places. I could have gone down to the 3–F ore raise and gotten away from the gas. I could

(Testimony of Mike Dragich.)

have gone around to the 5–I stope and gotten away from it there. There is a different way to go to the 800 raise. There is one place there was smoke come up. I don't know the other way to have gone around and up to the 800 raise (69). I generally eat my lunch in No. 3 shaft. They generally ate on the station there where we keep our lunch baskets—that station near the stope—and some miners were blasting and got to eat lunch and go to another place. The idea was simply to get out of the way from the blasting and there was smoke (70).

I knew that was the time for blasting. Nobody tell me about that. I don't know if anybody know or not. I don't know whether they always blast about 11 o'clock all over the level or not. They blast sometimes supper-time—sometimes quitting time. They always blast at either of those two times. They don't shoot any time. They shoot either just before supper-time or just before quitting time (71).

Plaintiff, by his counsel, offers in evidence the American Table of Mortality, showing the life expectancy of a man thirty-four years of age to be thirty-two and one-half years, and showing the life expectancy of a man thirty-six years old to be thirty-one and seven hundredths years, and same is admitted by consent of counsel for defendant (72).

Testimony of Mike Dragich, for Plaintiff (Recalled).

MIKE DRAGICH, a witness on behalf of plaintiff being recalled to the witness-stand for further cross-examination, testified as follows:

(Testimony of Mike Dragich.)

Martin Lazar was drilling lifters at this place with a machine drill. The drill makes a great deal of noise. Kuchan and I were going to the north at the time of the explosion. I was first and he was next. The explosion came out of the right-hand wall (73). The drill holes would be about 3 feet above the floor of the drift. It is a sort of [44] rounding place in there where the drilling was being done, in a sort of a bend around there, caved in there. That little curve was 25 or 30 feet where Martin was. We put in one round before 3 or 4 feet (74) so the curve would be 3 or 4 feet wider at that place. The curve, or extra width, was about 10 feet long up and down the drift. When this shot came off the debris or muck, or rock would have covered a space of 15 or 20 feet on each side as it went out against the other wall.

I was first. None of the rock hit me—it only cut my jumper a little. I was thrown forward headway. I was beyond, or in front of any rock. The man behind Nick told me he was not hit at all. I didn't hear anybody call to turn just before the explosion (75). I didn't hear anybody say a word only we was talking between ourselves when we walk. I didn't hear Nick start to turn to go back from there. I was walking headway. I not turn my head. I stated yesterday that I and the other men were about a yard apart at the time of the explosion. That was what I figured it was at the time of the explosion, but I can't tell exactly. I

(Testimony of Mike Dragich.)

can explain to the jury how Nick was hit on the left shoulder and left ear and left side of the face, by the explosion which came from the right-hand side. When we was walking the shots was on the right hand. When the shots came out I believe hit Nick on the shoulder and hit him on the—hit him against the other wall, then when he fell down he was laying right there and turned his face, you know, and at the same time the other shot came on and that second shot I think blew his eyes out. Of course the first shot can't blow his eyes out, only one, because that shot hit him on one eye and can't blow both eyes out. The second shot must have blown his both eyes out (76).

"Q. Well, now, if he had struck the wall, Mike, it would have simply bruised the arm, there wouldn't have been any of the imbedded rock in it, would there?"

"A. Well, that is—I can't explain very exactly, but so far I could understand how it was." [45]

I didn't hear anybody calling to Nick and me just before the shot went off. There were 4 or 5 of us together. We were 7 or 8 at the station, but 4 or 5 were together when we were going past the place of the explosion. I see Nick behind me but I can't see all behind, and I see the big tall fellow, Isaacson. Tom Lesh he was there (77). Some of the boys said before we left the station, "We going the other way."

"Q. And didn't they call to you after you left, don't you recollect that, and that Nick turned and

(Testimony of Mike Dragich.)

started back at the time of the explosion, toward the station?''

"A. After the time of the explosion, they kinder turned back that time.''

When the shot threw me I fell into the ditch and I don't know what happened then. They were scared all around, some go back to the station and some go to the 5–K. I was over there in the ditch and Nick was right there under the muck pile. There was one big tall fellow. He was a Swede—his name was Isaacson. I don't know where he is now. He did not turn and call to Nick that time. There were two shots went off, first shot went off and I got scared myself (78). I can't hear nothing from Nick except when the second shot went off. I can't hear. It was calm. You could hear nothing except I heard a man sobbing. That time I was 25 feet or more from Nick—I was in the dark—I can't tell exactly.

I was born in Austria but not in the same part as Nick. We have been friends from the day he come down to work with me. The other boy, Tom Lesh, is from Austria.

The shot and the rock would cover a space of 20 to 25 feet more or less (79). I was not hit by any rock and the man behind Nick told me he was not hit by any rock. Nick was the only one hit (80).

Redirect Examination by Mr. STRUCKMEYER.

Next day after the accident I saw Isaacson and the man supposed to have fired the shot and the man supposed to have been ordered to give [46] the warning. The second day I see this man up in the office

(Testimony of Tom Lesh.)

when somebody was there, Tally. I was asked to tell how it happened. I was asked questions (81).

Recross-examination by Mr. ANDERSON.

I didn't state at that time anything very particular —just what they asked me.

Re-redirect Examination by Mr. STRUCKMEYER.

Those two shots were about two seconds apart (82).

Testimony of Tom Lesh, for Plaintiff (Recalled).

TOM LESH, a witness for plaintiff, being recalled for further cross-examination, testified as follows:

I was behind Nick 4 or 5 feet when the shot went off. Between me and Nick was a Swede, Isaacson is his name. I was not hit—just blowed my hat off. Isaacson was not hit (83).

Testimony of George Kuchan, for Plaintiff.

GEORGE KUCHAN, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. STRUCKMEYER.

My name is George Kuchan. I know a man by name of Isaacson who was present at an accident to Nick Kuchan on the 19th of March. I know him well. I got his address in my possession. He is in Denver, Colorado (84).

Cross-examination by Mr. ANDERSON.

I have known Isaacson was in Denver, Colorado, ever since he was discharged from the United Verde Copper Company at Jerome, which was somewhere

(Testimony of George Kuchan.)

around June 1st of this year, 1917. He went to Denver and maybe he left since that date.

Mr. STRUCKMEYER.—The plaintiff rests. [47]

Whereupon defendant, at the close of plaintiff's case, by motion in writing, moved the Court to give to the jury the following instruction:

"The Court instructs the jury to find the defendant not guilty."

Which motion of the defendant was denied by the Court. To which ruling of the Court defendant, by counsel, then and there duly excepted. (85)

DEFENDANT'S EVIDENCE.

Testimony of Dr. L. P. Kaul, for Defendant.

Dr. L. P. KAUL, a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. ANDERSON.

My name is L. P. Kaul. I am a physician and surgeon duly licensed in this state. I am in charge of the medical department of the United Verde Copper Company at Jerome. I know Nick Kuchan and first knew him when he was hurt on the 18th or 19th of March (86). I have seen him since that date considerably. We did all we could to make him comfortable as possible until about July, when we sent him to Phoenix to see what further help, if any, could be given him. He returned with little hope held out by the man to whom we sent him, Dr. Martin (87).

Dr. Martin specializes in eye work. Kuchan's condition is as follows: He is totally blind in both eyes, his hearing is very much impaired in his left

(Testimony of Dr. L. P. Kaul.)

ear and the drum is ruptured. The hearing in his right ear may be impaired, though he hears fairly well in that ear. He has some destruction of the molar bones of the cheek and some of the surface of the cheek, and there are some wounds over his left shoulder. Further than that I have no complaint of any kind from him. I have seen him daily. He has gone to his meals up and down the stairs, to his bed and to the hotel. He has been with us from the time he returned from Phoenix July, 1916, until the 3d of August of this year, 1917. I have had no complaint from him about the left arm except of some little disturbance in the fingers (88). [48]

In my opinion he is able to attend to his personal wants absolutely, so far as any blind man could. I have seen him every day about the hospital during this time that I have been there. There is a possibility that the raw surface over the cheek might be healed. We offered to perform the operation and still offer to do it, and we went to Dr. Martin with a proposition to do it. It was not done because the boys felt they wanted the assurance that the healing would be complete and we could not agree to that. It is a more or less delicate operation so far as the result is concerned and we could not guarantee that, so they decided not to have it done (89). We have offered on behalf of the company to perform the operation (90).

Cross-examination by Mr. STRUCKMEYER.

When I say we offered to do it on behalf of the company I meant in the hospital. The hospital is

(Testimony of Dr. L. P. Kaul.)

wholly sustained by contributions of the men, paying a dollar and a half a month each. I did it on behalf of the plaintiff and his coemployees instead of on behalf of the company. I am a general practitioner (91). I do surgery largely. Skin-grafting and dermatology follows in the general line of surgery.

Dr. Martin is a specialist on the eye and ear and does not hold himself out as a surgeon of skin-grafting that I know of. It is not a fact that Kuchan wanted me to send him to California for a specialist so that success could be guaranteed. They wanted me to guarantee a cure (92). I couldn't tell you how many operations I have performed around the sockets of the eye for skin-grafting.

Redirect Examination by Mr. ANDERSON.

The hospital building and equipment is maintained, built and owned by the United Verde Copper Company. The United Verde Company also pays my salary and the salary of three assistants and pay for the equipment there. In return they take from the single men who work there a dollar and a half a month (93). [49]

The United Verde Company has furnished Nick Kuchan all the nursing and his board and room during all this time and have not charged him one penny for it at any time. No expense whatever. The hospital is maintained by the company and by the contributions of the men. The hospital is controlled direct by the company. The company make their deductions from the men of a dollar and a half for single men—two dollars for married men and that

(Testimony of Dr. L. P. Kaul.)

sum is used wholly for the maintenance of the hospital department. Everybody in the hospital is on a salary (94).

Recross-examination by Mr. STRUCKMEYER.

I do not know whether the fund is sufficient to defray all expenses. I have no access to the hospital accounts. I said the only complaint Kuchan ever made (as to his left arm) was his fingers. Lack of sensation frequently follows an injury. It is not paralytic by any means (95). If there was destructions there would be no sensation. Lack of sensation might follow an injury to the nerve cells. There had been no complaint of any kind sufficient to warrant my attention to, or investigation of the cause of this lack of sensation.

Defendant offers in evidence affidavit of counsel for defendant, which was made immediately prior to the trial of the case in order to obtain a continuance of same on the ground that the presence of material witnesses could not be obtained, notwithstanding due diligence on the part of defendant, and as to which affidavit counsel for plaintiff admitted that the witnesses therein named, if personally present, would testify as in said affidavit set forth, and that the same might be read in evidence subject to any objection that might be made as to materiality and relevancy, whereupon the Court denied defendant's motion for a continuance. In the said affidavit it is stated that the witnesses would testify as follows: [50]

"That said Martin Lazar was a miner, working for the defendant at the time of the injury of plaintiff

herein; that said Lazar drilled the hole and placed the shot that caused the explosion complained of by plaintiff; that the plaintiff knew that said Martin Lazar was working in the place where said explosion took place, prior to the explosion, and that there was no other workmen in that particular drift save Martin Lazar; that prior to the said blasting said Lazar's shift boss instructed him at the time of the blasting to give warning that said blast was to take place; that previous to the blasting, said Martin Lazar gave the warning as instructed; that he went to some workmen at the lower end of the drift and asked one of them to warn any workmen coming that way, and particularly the watchman, who might come past where the blasting was to take place; that he instructed Kotch to go in the other direction and to do the same thing, and that he, Lazar himself, went in the third direction; that according to said Lazar's request, said two workmen went in the indicated directions as ordered by said Lazar; that said Lazar will testify that it is the rule and custom in said mine to blast in the neighborhood of eleven o'clock, and that it was well known to all miners working there that this was the hour of blasting; that experienced miners knew this time, and that said experienced miners never went into a drift or stope other than the one they were working in at said times without taking precautions and making inquiries as to the blasting for their own safety; that the said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said

warning; that said fuse from said blast was in plain view to anyone passing and the smoke from same could readily have been seen by anyone approaching; that plaintiff was not called upon in the course of his business to pass past the said place of blasting; that the plaintiff voluntarily passed by the said place of blasting, and there was no occasion for the plaintiff to have done so in the course of his employment; that there were no men called upon to pass said place of [51] blasting in the course of their employment in said mine; that said Lazar was the only man working in said drift, and no other work of any kind was being performed therein; that plaintiff voluntarily passed said place of blasting and not in the course of his business or duties; that defendant can prove by said John Kotch substantially the same as above stated by Lazar, save and except that said Kotch was working in another part of the mine, and that said Lazar came to Kotch and another workman and informed them that he was going to blast, and for each of them to go in different directions to give warning to any other persons; that said Kotch and said other workmen understood said instructions and proceeded to their respective places prior to the blasting; that the said Kotch will testify as to all of the other statements before stated in the testimony of the said Lazar, as to experienced miners; no other workmen in the drift where said explosion took place than Lazar; that plaintiff was not compelled to pass said place in the discharge of his duties; that no other workman was compelled to pass said place in the discharge of his duties; that it is the rule and custom

to blast at that time and that experienced miners all exercised care and caution on their own behalf in going into other places than where they were working at the time of blasting, and that said Lazar gave warning before stated."

Whereupon, plaintiff objected to the following sentence in said affidavit on the ground that it was immaterial and irrelevant, being immaterial as to what instructions were given to other workmen:

"That he went to some workmen at the lower end of the drift and asked one of them to warn any other workmen coming that way, and particularly the watchman who might come past where the blasting was to take place."

Which objection of plaintiff was by the Court sustained. To which ruling of the Court defendant, by counsel, then and there duly excepted. [52]

Plaintiff also objected, on the ground that the same was immaterial and irrelevant, to the following sentence in said affidavit:

"That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning."

Which objection was by the Court sustained. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Whereupon defendant offered to show by said affidavit that the witness would testify to the following facts:

"That he went to some workmen at the lower end of the drift and asked one of them to warn any other

workman coming that way, and particularly the watchman, who might come past where the blasting was to take place."

Which offer was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Whereupon defendant offered to show by said affidavit that the witness would testify to the following facts:

"That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning."

Which offer was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Thereupon counsel for defendant read in evidence to the jury the following from said affidavit:

"That said Martin Lazar was a miner, working for the defendant at the time of the injury of plaintiff herein; that said Lazar drilled the hole and placed the shot that caused the explosion complained of by plaintiff; that the plaintiff knew that said Martin Lazar was working in the place where said explosion took place, prior to the explosion, and that there was no other workmen in that particular drift save Martin Lazar; that prior to the said blasting said Lazar's shift boss instructed [53] him at the time of the blasting to give warning that said blast was to take place; that previous to the blasting, said Martin Lazar gave the warning as instructed; that he instructed Kotch to go in the other direction and to

do the same thing, and that he, Lazar himself, went in the third direction; that according to said Lazar's request, said two workmen went in the indicated directions as ordered by said Lazar; that said Lazar will testify that it is the rule and custom in said mine to blast in the neighborhood of eleven o'clock, and that it was well known to all miners working there that this was the hour of blasting; that experienced miners knew this time, and that said experienced miners never went into a drift or stope other than the one they were working in at said times without taking precautions and making inquiries as to the blasting for their own safety; that said fuse from said blast was in plain view to anyone passing and the smoke from same could readily have been seen by anyone approaching; that plaintiff was not called upon in the course of his business to pass past the said place of blasting; that the plaintiff voluntarily passed by the said place of blasting, and there was no occasion for the plaintiff to have done so in the course of his employment; that there were no men called upon to pass said place of blasting in the course of their employment in said mine; that said Lazar was the only man working in said drift, and no other work of any kind was being performed therein; that plaintiff voluntarily passed said place of blasting and not in the course of his business or duties; that defendant can prove by said John Kotch substantially the same as above stated by Lazar, save and except that said Kotch was working in another part of the mine, and that said Lazar came to Kotch and another workman and informed them that he was going to

blast, and for each of them to go in different directions to give warning to any other persons; that said Kotch and said other workmen understood said instructions and proceeded to their respective places prior to the blasting; that the said Kotch will testify as to all of the other statements before stated in [54] the testimony of the said Lazar, as to experienced miners; no other workmen in the drift where said explosion took place than Lazar; that plaintiff was not compelled to pass said place in the discharge of his duties; that no other workman was compelled to pass said place in the discharge of his duties; that it is the rule and custom to blast at that time and that experienced miners all exercised care and caution on their own behalf in going into other places than where they were working at the time of blasting, and that said Lazar gave warning before stated."

Defendant rests.

Plaintiff rests.

At the close of all the evidence the defendant presented its written Motion asking the Court to instruct the jury to find the defendant not guilty. Which motion was by the Court denied. To which ruling of the Court defendant, by counsel, then and there duly excepted.

Thereupon, Mr. Anderson, counsel for the defendant, in his argument to the jury, stated that notwithstanding he contended there was no negligence on the part of defendant, he was willing that the jury bring in a verdict for seven thousand five hundred dollars ($7,500.00), but that he was not willing that they bring in a verdict for more than seven thou-

sand five hundred dollars ($7,500.00) unless the jury believed the defendant was guilty of negligence. That he did not claim in this case that the plaintiff was guilty of contributory negligence.

Whereupon the Court instructed the jury as follows:

Instructions of Court to Jury.

"The COURT.—Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover the sum of sixty thousand dollars as damages for an alleged personal injury sustained, or claimed to have been sustained by him while in the employ of the defendant. The complaint has been read in your presence and hearing, as well as the answer, and I deem it unnecessary to again read it. The [55] complaint alleges in substance—and I am merely stating the substance of the complaint and answer to refresh your recollection as to the issues which you would be called to pass upon—I say, the complaint alleges that on or about the 19th day of March, 1916, the plaintiff was employed by the defendant in its mine in Yavapai County, Arizona, upon a certain level of said mine, known as the 700-foot level, and upon which level, on that date, the defendant had there in its employ certain other servants who were engaged in blasting and discharging explosives; that while plaintiff was going from one place upon said 700-foot level to another place upon said 700-foot level, in the course of his employment, and in the exercise of due care for his own safety, a large quantity of dynamite or other high explosive,

which the defendant had then and there placed upon said 700-foot level in a hole drilled for that purpose was, by the defendant, through his servants, negligently, carelessly and without any warning to the plaintiff, suddenly discharged; that as a result of said explosion the plaintiff was struck with a great quantity of rocks, stones and debris and buried beneath the same, whereby he sustained severe injuries in that both of his eyes were totally destroyed and his hearing partially destroyed and his entire body injured and bruised; that the plaintiff was thereupon permanently injured and crippled and would be unable hereafter to pursue any work or labor whatsoever.

The defendant, in its answer, admits that the plaintiff was in its employ, admits that the plaintiff was injured on the said date, but denies that he was injured to the degree and in the manner set forth in the complaint; denies that at the time of said injury plaintiff was in the exercise of proper care and caution for his own safety, or that at the time of said injury he was acting in the course of his employment. The defendant denies that its servants negligently, carelessly and without warning to plaintiff discharged and exploded said dynamite, but [56] alleges that the plaintiff knew at the time of his injury that it was the time and that he was in the place for blasting, and that he went for his own pleasure past the place of said blasting after due and repeated warnings as to the danger there; that the plaintiff was injured solely and wholly by his own fault and by his failure to exercise that degree of

care required of him by law. The defendant further alleges that plaintiff was injured by one of the usual and ordinary risks of employment, which risk the plaintiff assumed when entering the employment of defendant.

Under the admission of counsel in this case representing the defendant, I shall decline to charge you on the question of contributory negligence and the question of assumption of risk.

You are made by the law the sole judges of the facts in this case and the credibility of each and all of the witnesses who have testified in this case, and of the weight that you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility of a witness and the weight you will give to his testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive which he may have shown, and the probability or improbability of the truth of his statement when considered in connection with all the other evidence in the case. When I refer to the testimony of witnesses, I mean to include the plaintiff, who has been examined in this case in his own behalf—who has testified in his own behalf. You are not to disregard the testimony of the plaintiff merely because he is the plaintiff, nor should you disregard the testimony of defendant's witnesses merely because they are in the employ of defendant.

It will be your duty, in arriving at a verdict in this case, to be governed by the evidence in the case and the law as the Court gives it to you, regardless of

the conditions of the parties financially or of [57] the effect of your verdict upon the parties or either of them. It is your imperative duty to try this case and to decide it precisely the same as if it were a case between two individuals and the fact that the plaintiff is an individual and an alien, that is, not a citizen of the United States, and the fact that the defendant is a corporation should make no difference whatever in the consideration of this case. In other words, what you will endeavor to do, what you should endeavor to do is to do justice between these litigants regardless of the consequences. You are to look at the evidence in this case in a common-sense light and to endeavor to arrive at the truth of this transaction as the evidence shows it to be.

Now, I charge you that the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence—I mean the greater weight of the evidence—the material allegations in his complaint, and if he has failed to do so he cannot recover in this action; unless, I say, you accept the statement of counsel for defendant that he is willing for a judgment of seventy-five hundred dollars to be returned against the defendant.

You will observe from the issues stated, from the reading of the complaint, that negligence on the part of the defendant company must be proved and established as the basis of a recovery in this case. This being an action at common law for damages for personal injuries brought by the plaintiff, before he can recover he must prove all of the material allegations of his complaint. He cannot recover under the em-

ployer's liability law or under the workmen's compulsory compensation law, and before he can recover in this action he must prove that the defendant, through its negligence or the negligence of its servants or agents caused his injury, and if you find that this injury complained of was occasioned by any other cause than the company's negligence or that of its servants or employees or agents, then the plaintiff cannot recover in this action. [58]

In determining whether or not the defendant has been guilty of negligence, I charge you that any act of any of the officers or agents or servants of the defendant company, committed within the scope of his or their employment, is the act of the company and the defendant company is responsible for the same, even though such servant was a co-worker or fellow servant with the plaintiff.

Now, by negligence, is meant the want of reasonable or ordinary care which, under the same conditions and circumstances, would be exercised by persons of ordinary prudence and foresight. Negligence is the failure to do what a reasonable and prudent man would ordinarily have done under circumstances existing, or doing what such a person under existing circumstances would not have done. The essence of the failure may lie in omission and commission, the doing or the failure to do, and the duty is dictated and measured by the exigencies of the occasion. Whether negligence exists in any particular state of facts is always a question for the jury and not for the Court. In other words, gentlemen, you are the triers of the facts of the case; the

Court is supposed to give you the law of the case.

You are instructed that the law requires a mining company such as the defendant, before firing charges or explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given to the plaintiff and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action.

On the other hand, gentlemen, I had intended to charge you of the questions of contributory negligence of the plaintiff or any negligence on his part which may have caused the injury, in other words, any carelessness [59] or negligence which proximately caused the injury, and on the question of assumption of risks, that is, of assuming the ordinary and usual risks incident to the employment, such risks as are open and apparent to the workman, but, in view of counsel's consent that a judgment for seventy-five hundred dollars may be rendered against the company, I have decided not to charge on those two subjects.

As before stated, the burden is upon the plaintiff to prove defendant was guilty of negligence, that is, if the plaintiff recovers more than seventy-five hundred dollars and that negligence caused the injury

complained of. In other words, the burden of proving negligence rests on the party alleging it, and where a party charges negligence on the part of another he must prove the negligence by a preponderance of evidence in the case. If the jury finds that the weight of the evidence is in favor of the defendant or that it is equally balanced, then the plaintiff cannot recover and the jury should find for the defendant, except for this seventy-five hundred dollars just referred to.

Now, if the plaintiff in his case has failed to prove to your satisfaction, by a preponderance of the evidence, that the defendant company was negligent, and that such negligence was the direct and proximate cause of his injuries, then the plaintiff cannot recover, except the seventy-five hundred dollars.

But, if the admission of counsel is adequate to meet your conclusion, then you would go no further in the case. You would be relieved of considering any and all of the issues raised by the pleadings in this case, and you would then return a verdict for the defendant. To repeat a little—it is necessary to do so in view of the changed condition of the case since the evidence closed—I say, if you come to the conclusion that the defendant company was not negligent, that its negligence was not the proximate cause of these injuries which the plaintiff has sustained, then you need not go any farther in the case at all. You stop right there and need not consider the other questions, the measure of [60] damages or anything else. You would just render a verdict in favor of defendant except, as the case now stands,

you may, in any event, render a verdict for the plaintiff in the sum of seventy-five hundred dollars.

Now, in this action I charge you that an employer is not an insurer of the lives of persons in its employ. The law does not require that a corporation or an individual who employs men to work for it shall guarantee or insure their safety or to make a place in which they work absolutely safe. What the law does require of all employers, whether individual or a corporation, is that they shall use ordinary care to furnish a reasonably safe place within which their employees are required to work.

Now, ordinary care and caution depends upon the circumstances of each particular case, and it is such care or caution as a person of ordinary prudence and skill would usually exercise under the same or similar conditions; and if you find from the evidence in this case that the defendant did exercise such ordinary prudence and skill under the circumstances of this case that a person of ordinary prudence and skill would have exercised, then the plaintiff cannot recover in this action, except in the sum of seventy-five hundred dollars, to which counsel consents, and for which you may find a verdict.

Now, notwithstanding that admission, I instruct you that if you find that the plaintiff is entitled to recover in this action, the amount of recovery is for you to determine from all the facts and circumstances in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if he is entitled to more than seventy-five hundred dollars, but it is for you to say, in the exer-

cise of sound discretion, from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor, and without passion or sympathy or prejudice, what amount of money would reasonably compensate this plaintiff for the damage and the injuries which he has sustained. I say, it is for you to determine that. [61]

In the ascertaining of the amount of damages, the law does not lay down any definite, mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment and make such an award of damages as would be a just compensation for this plaintiff's injuries. They should not be inadequate, they should not be excessive.

Now, if you find a verdict for the plaintiff, he is entitled to actual damages only; such damages to be based upon the evidence in the case as reasonable and just compensation for the actual damages sustained by reason of the injury. There can be no damages in the way or in the nature of exemplary, punitive or vindictive damages; that is, you must not render a verdict which is a punishment to this defendant company. You cannot do it as an example to this company or any other company. If you do, you violate the instructions of the Court, and the Court will be compelled to set such a verdict aside, but your verdict must be based upon the evidence in the case as to the actual loss and damage suffered by the plaintiff and, as I said, not as a punitive nor as a penalty, even though you may come to the conclusion that the defendant was very negligent.

Now, you have no right to conjecture, no right to resort to chance or to the field of surmise to arrive at the amount. The amount must be based upon evidence as a fair and a reasonable compensation for the injuries received by the plaintiff.

Now, then, there are some rules which I might suggest to you and which the experience of Courts and jurors have suggested, and that is, that in estimating the plaintiff's damages you will determine whether said injuries described by him and the other witnesses were severe or light, whether they are temporary or permanent, and to what extent, if at all, such injury or injuries have incapacitated him from pursuing his usual occupation of manual labor. If you believe from the evidence that these injuries are permanent and will disable him to labor and earn money in the future, or if you believe that his physical condition [62] has been impaired to labor and earn money in the future, then you may find such a sum as will be a fair compensation for his diminished capacity to labor and earn money in the future. In estimating a probable difference in his earning capacity, you may take into consideration what the plaintiff's income was at and prior to the time of the accident; whether he had been regularly employed; what his income would probably have been had the accident not occurred; how long this income would have lasted in the future; whether he would be steadily employed in the future, and all the contingencies to which his earnings would have been subjected. Some people have an idea that a man in a personal injury case should receive a sum which, put

at interest at a reasonable per cent, would net him an amount equal to the amount he was earning before he received the injuries, but you can readily see that that would not be a correct standard or criterion to follow in personal injury cases, because if you were to allow a man such a sum he would receive, during the balance of his life, a sum the interest of which would be equal to what he had been earning and, at his death, the principal would still be unimpaired. So you see that would be an unfair amount to require a defendant ordinarily to pay.

The testimony in this case shows that the plaintiff, at the time of the injury, was thirty-four years of age, and testimony has been received for the purpose of showing that the probable duration of life of a person thirty-four years of age is thirty-two and a half years. Now, this testimony was based upon the American Table of Mortality, which is framed upon the basis of the average duration of the lives of a great number of persons, but it has been held by the Courts that the rules to be derived from such tables may not be the absolute guides of the judgment and conscience of a jury in a case of this character. It might, however, be considered by you in connection with all the other facts, all the other evidence in the case.

As above stated, if you find in favor of the plaintiff, you should award a fair and reasonable compensation, taking into consideration what [63] the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies as to which it was liable.

Now, in estimating the plaintiff's damages, if you come to the conclusion that he is entitled to damages in excess of the sum of seventy-five hundred dollars, you may also take into consideration the amount of physical pain and suffering, if any, consequent upon the injuries received. If, in considering the amount of damages, you are unable to agree among yourselves as to the amount, you are not to compromise or return a compromise verdict. It is sometimes called a "quotient" verdict. I do not mean by that, when you go to your room if you have different views that you must not endeavor to come together and reconcile your views for the purpose, if possible, to do justice in the premises and to arrive at a verdict. No man should go to the jury-room "with his head set," if you will excuse the expression, but should be at all times willing to listen to his fellow-jurors and to exchange ideas with them and, after exchanging ideas, endeavor to arrive at the truth of the transaction so that justice may be done between the parties.

If you find for the plaintiff in this case under the instructions given you by the Court, find that the plaintiff has sustained damages as set forth in the complaint, or any damages, and has proven damages, then to enable you to estimate the amount of the damages it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but you may, yourselves, make such estimate from all the facts and circumstances in proof and by considering them with your knowledge, observation

and experience in the ordinary, every-day affairs of life.

If, under all the facts in the case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the injuries he has sustained, and have come to the conclusion that it should be more than seventy-five hundred dollars, then you must not render what is known as a "quotient" verdict. That is, you must not add together the different sums which [64] you believe the plaintiff is entitled to and divide by 12 or any other number. Such or any similar method of arriving at the plaintiff's compensation would be unlawful, and the Court would be compelled to set such a verdict aside.

I believe it has been stated to you what effect should be given to the statements offered in evidence by the defendant. The defendant has stated to you what the defendant expected to prove by certain witnesses who are absent. The plaintiff admitted that if such witnesses were present they would testify as set forth in that statement, which was read in your presence and hearing, but the plaintiff does not admit that these facts are true. You will take it just as though those witnesses had appeared on the witness-stand and had given their testimony, and it is for you to determine what the truth of the transaction is.

If there is any dispute as to any particular fact, if the witnesses do not agree, then it is your duty to reconcile the testimony, if you can possibly do so, and, if you cannot, then give credence to the wit-

nesses whom you believe to be credible and worthy of belief.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empanelled in the above-entitled case, upon our oath do find for the plaintiff and assess his damages at," so much, so many dollars. Insert whatever amount you conclude to award him. You cannot, under the agreement of counsel in this case—you can, but you should not in this case, find a verdict for the defendant, because counsel agree that in any event you may render a verdict against the defendant in favor of the plaintiff in the sum of seventy-five hundred dollars.

The plaintiff may have an exception to the action of the Court in refusing some of plaintiff's requested instructions, and an exception to the giving of certain instructions requested by the defendant. The defendant may have an exception to the action of the Court in giving certain instructions on behalf of plaintiff, and in refusing certain [65] of the requested instructions of defendant. Are there any exceptions on the part of plaintiff to the Court's general instructions?

Mr. STRUCKMEYER.—No, your Honor.

The COURT.—Any exceptions on the part of defendant to the Court's general instructions?

Mr. ANDERSON.—No.

Defendant, by counsel, preserved an exception to the following instruction to the jury requested by plaintiff and given by the Court as above set forth:

"You are instructed that the law requires a mining company such as the defendant, before firing

charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action."

And thereupon the jury returned into open Court their written verdict in said case as follows:

"We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at the sum of $25,000.00 and court costs.

W. O. HOOGESTRAAT,
Foreman."

And thereafter defendant, by counsel, moved the Court for a new trial, which motion was on October 24th, 1917, denied by the Court.

And thereupon, on the 24th of October, 1917, the District Court entered said verdict and then and there rendered final judgment thereon in favor of the plaintiff, Nick Kuchan, and against the defendant, United Verde Copper Company, for the sum of Twenty-five Thousand Dollars [66] ($25,000.00) and costs; to all of which the said defendant duly excepted at the time and in open court.

And thereupon, on the same day, the Court also

entered of record an order allowing said defendant until fifteen (15) days thereafter to file a bond for Thirty Thousand Dollars ($30,000.00), and sixty (60) days after October 24th, 1917, in which to present and file its Bill of Exceptions in said cause.

Order Settling Bill of Exceptions.

And the foregoing is all of the evidence given, or received, or offered, or admitted at the trial of this cause; and such proceedings were had, and such objections to evidence, and such offers and refusals of offers of evidence, and such motions and such requests for instructions, and such refusal of instructions requested, and such rulings by the Court were made, and such instructions were given, and such exceptions were taken and saved, at the respective times of the several rulings and actions excepted to as herein indicated in the foregoing pages.

And forasmuch as the matters and things above set forth do not fully appear of record, the said defendant, United Verde Copper Company, presents this, its Bill of Exceptions in said cause, and prays that the same may be signed and sealed and made of record in this cause, by this Honorable Court, pursuant to the law in such cases. Which is accordingly done and ordered by this Court on this 16th day of November, A. D. 1917.

WM. H. SAWTELLE,
Judge of said District Court.

O. K.—ANDERSON, COLEMAN & NILSSON.
By J. L. COLEMAN.
F. C. STRUCKMEYER and
J. S. JENCKES,
Attys. for Pltff. [67]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Bill of Exceptions. Filed Nov. 16, 1917, at —— M. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. Law Offices of Le Roy Anderson, Prescott, Arizona. [68]

In the District Court of the United States, for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The United Verde Copper Company, a corporation of the State of West Virginia, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the twenty-fourth day of October, nineteen hundred and seventeen, comes now by Anderson, Coleman & Nilsson, its attorneys, and petitions said court for an order allowing said defendant to prosecute a Writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that

behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals.

And your petitioner will ever pray.

ANDERSON, COLEMAN & NILSSON,
Attorneys for Defendant. [69]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Petition for Writ of Error. Filed Nov. 16, A. D. 1917. Mose Drachman, Clerk. [70]

In the District Court of the United States, for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,
Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Now comes the defendant, United Verde Copper Company, a corporation of the State of West Virginia, by Anderson, Coleman & Nilsson, its attor-

neys, and in connection with its Petition for a Writ of Error herein, says, that in the record and proceedings during the trial of the above-entitled cause, and in the said judgment in the said District Court, error has intervened to its prejudice, and this defendant here makes the following Assignment of Errors upon which it will rely in the prosecution of the Writ of Error in the above-entitled cause, to wit:

1. The District Court erred in sustaining an objection by counsel for plaintiff, to, and in refusing to admit in evidence, on the ground that the same was irrelevant and immaterial, the following from the evidence of Martin Lazar:

> "That he (Martin Lazar) went to some workmen at the lower end of the drift and asked one of them to warn any workmen coming that way, and particularly the watchman who might come past where the blasting was to take place." [71]

2. The District Court erred in sustaining an objection by counsel for plaintiff to, and in refusing to admit in evidence, on the ground that the same was irrelevant and immaterial, the following from the evidence of Martin Lazar:

> "That said Lazar fully explained to said workmen what he was doing and was going to do, and that they assured him that they understood his instructions concerning said warning."

3. The District Court erred in giving to the jury the following Instruction requested by plaintiff:

"You are instructed that the law requires a mining company such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give, warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not so given, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action."

4. The verdict of the jury is contrary to the law.

5. The verdict of the jury is contrary to the evidence.

6. The judgment in said case is contrary to the law.

7. The judgment in said case is contrary to the evidence.

WHEREFORE, said United Verde Copper Company, by reason of the errors aforesaid, prays that said judgment [72] against it, the said United Verde Copper Company, may be reversed, set aside, and held for naught.

ANDERSON, COLEMAN & NILSSON,
Attorneys for Defendant United Verde Copper Company. [73]

[Endorsed]: No. 30. (Prescott). In the District Court of the United States, for the District of Ari-

zona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Assignment of Errors. Filed Nov. 16th, A. D. 1917. Mose Drachman, Clerk. [74]

In the District Court of the United States for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,

Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Copper Company, a corporation, of the State of West Virginia, as principal, and Walter C. Miller, and R. N. Fredericks, as sureties, of Yavapai County, Arizona, are held and firmly bound unto Nick Kuchan, his heirs, executors and administrators in the full and just sum of Thirty Thousand Dollars ($30,000.00), lawful money of the United States, to be paid to the said Nick Kuchan, his heirs, executors and administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of November, A. D. 1917.

WHEREAS, lately at a session of the District Court of the United States for the District of Arizona, in a suit pending in said Court between Nick Kuchan, plaintiff, and United Verde Copper Company, defendant, judgment was rendered against said United Verde Copper Company, defendant, and the said defendant, United Verde Copper Company, has obtained from said Court a Writ of Error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the District Court in the aforesaid suit, and a citation directed to the said Nick Kuchan, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, within thirty (30) days after the date of said citation;

NOW, the condition of the above obligation is such that, if the United Verde Copper Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

It is expressly agreed by the sureties hereto that, in case of a breach of any condition of this bond, the District Court of the United States for the District of Arizona, may upon notice to said sureties of not less than ten days, proceed summarily in the action or suit in which said Bond is given, to ascertain the amount which such sureties are bound to pay on account of such breach, and render judgment therefor

against them, and award execution therefor.

UNITED STATES COPPER COMPANY,
By ROBT. E. TALLY,
Its Asst. Genl. Mgr.
Principal.
WALTER C. MILLER, (Seal)
R. N. FREDERICKS, (Seal)
Sureties. [75]

State of Arizona,
County of Yavapai,—ss.

On the 13th day of November, 1917, personally appeared before me Walter C. Miller and R. N. Fredericks, respectively, known to me to be the persons described in and who executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Walter C. Miller and R. N. Fredericks, being respectively by me duly sworn, says each for himself, and not one for the other, that he is a resident and householder of the said County of Yavapai, and that he is worth the sum of Thirty Thousand Dollars ($30,000.00) over and above his just debts and legal liability and property exempt from execution.

WALTER C. MILLER.
R. N. FREDERICKS.

Subscribed and sworn to before me this 13th day of November, A. D. 1917.

[Seal] M. E. CAHILL,
Notary Public.

My commission expires July 1, 1919.

Approved by Wm. H. Sawtelle, Judge of the United States District Court for the District of Arizona, this November 16th, 1917.

WM. H. SAWTELLE,
Judge.

O. K.—STRUCKMEYER & JENCKES. [76]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, Defendant. Bond. Filed Nov. 16th, 1917, A. D. Mose Drachman, Clerk. [77]

In the District Court of the United States, for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,
Plaintiff,

vs.

UNITED VERDE COPPER COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error, etc.

Upon motion of Anderson, Coleman & Nilsson, attorneys for defendant, and upon filing a petition for a Writ of Error and Bond on said Writ of Error in the sum of Thirty Thousand Dollars ($30,000.00), and an Assignment of Errors, it is ordered that a Writ of Error be and the same hereby is allowed to

have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and it is further ordered that all further proceedings in this Court be and they hereby are suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

WM. H. SAWTELLE,
District Judge.

Dated November 16th, 1917. [78]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States for the District of Arizona. Nick Kuchan, Plaintiff, vs. United Verde Copper Company, a Corporation, Defendant. Order Allowing Writ of Error and Granting Stay. Filed Nov. 16, 1917. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [79]

In the United States District Court for the District of Arizona.

No. 30 (Prescott).

NICK KUCHAN,
Plaintiff (Defendant in Error),
vs.
UNITED VERDE COPPER COMPANY, a Corporation,
Defendant (Plaintiff in Error).

Certificate of Clerk of United States District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the seventy-nine (79) pages, numbered from one (1) to seventy-nine (79), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above-entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant, plaintiff in error, for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [80]

Clerk's fee (Sec. 828, R. S. U. S., as Amended by Sec. 6, Act of March 2d, 1915), for making typewritten transcript of record—214 folios at 10 cents per folio.....$21.40
Certificate and seal to said transcript..... .35

Total.....$21.75

I hereby certify that the above cost for preparing and certifying record, amounting to $21.75, has been paid to me by Bullard and Jacobs for Anderson, Coleman & Nilsson, counsel for defendant, plaintiff in error herein.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation in this cause.

WITNESS my hand and the seal of said District Court affixed at my office in Phoenix, Arizona, this 11th day of December, A. D. 1917.

[Seal] MOSE DRACHMAN,
Clerk.
By Nat. T. McKee,
Deputy Clerk. [81]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable The Judge of the District Court of the United States, for the District of Arizona, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court before you, between the United Verde Copper Company, a corporation, of the State of West Virginia, plaintiff in error, and Nick Kuchan, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its Complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of San Francisco, California, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within thirty (30) days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct [82] that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United

States, the 16th day of November, A. D. Nineteen Hundred and Seventeen.

MOSE DRACHMAN,

Clerk of the United States District Court for the District of Arizona.

Allowed by:

WM. H. SAWTELLE,
District Judge. [83]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Writ of Error. Filed Nov. 16th, A. D. 1917, at —— M. Mose Drachman, Clerk. By ————————, Deputy Clerk. [84]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to Nick Kuchan and Struckmeyer and Jenckes, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Copper Company, a West Virginia corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in

error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, WILLIAM H. SAWTELLE, Judge of the District Court of the United States, for the District of Arizona, this 16th day of November, A. D. Nineteen Hundred and Seventeen.

WM. H. SAWTELLE,
District Judge.

Received a copy of the within and foregoing Citation this 19th day of November, A. D. Nineteen Hundred and Seventeen.

STRUCKMEYER & JENCKES,
Attorneys for Defendant in Error. [85]

[Endorsed]: No. 30 (Prescott). In the District Court of the United States, for the District of Arizona. United Verde Copper Company, a Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Citation and Service. Filed Nov. 16, A. D. 1917, at —— M. Mose Drachman. By ————, Deputy Clerk. [86]

[Endorsed]: No. 3089. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Copper Company, a West Virginia Corporation, Plaintiff in Error, vs. Nick Kuchan, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the District of Arizona.

Filed December 13, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.